

Mbogoye (Migration) [2024] AATA 126 (24 January 2024)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mrs Anna Joram Mbogoye Ms Betha Emmanuel Bihemo
REPRESENTATIVE:	Dr Muhammad Faisal Ahmed (MARN: 0955557)
CASE NUMBER:	1928963
HOME AFFAIRS REFERENCES:	BCC2017/1642368 BCC20171642368
MEMBER:	Glynis Bartley
DATE:	24 January 2024
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211(2) of Schedule 2 to the Regulations • cl 820.221 of Schedule 2 to the Regulations • and with the direction that the second named applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.311(a)(i) of Schedule 2 to the Regulations

Statement made on 24 January 2024 at 4:27pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – validly married – financial, household and social aspects of relationship and nature of commitment – substantial evidence and supporting statements –

adverse information – sponsor not divorced from previous wife and contrived relationship – previous marriage certificate not signed – sponsor’s youngest child with previous partner born after start of current relationship and birth of oldest child – outweighed by other evidence – member of family unit child now Australian citizen – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F(2), 65, 359AA, 376

Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 820.211(2)(a), 820.221, 820.311(a)(i)

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

ISSUE

1. The issue in this case is whether the applicant, Mrs Anna Joram Mbogoye, is the spouse or de facto partner of her sponsor, Mr Emmanuel Msafiri.

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
3. The first named applicant (the applicant) applied for the visa on 8 May 2017 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations).
4. On 1 October 2019, the delegate refused to grant the visas on the basis that the applicant did not meet cl.820.211(2)(a). The delegate was not satisfied on the basis of the evidence provided that the applicant was the spouse or de facto partner of the sponsor.
5. The applicants applied to the Tribunal for review of the decision on 14 October 2019.
6. The applicant appeared before the Tribunal on 15 January 2024 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and the sponsor's mother, Ms Olivia Ntacobankurako. The Tribunal hearing was conducted with the assistance of an interpreter in the Swahili language, who attended by video conference.
7. The applicants were represented in relation to the review by their registered migration agent who attended the hearing.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

BACKGROUND

9. The applicant is a 32-year-old citizen of Tanzania. She has not declared any previous marriages or de facto relationships. The applicant first came to Australia on 1 November 2016 after being granted a Prospective Marriage visa (Subclass 300). The applicant's father is deceased. Her mother and seven siblings live in Tanzania. Prior to her arrival in Australia, the applicant was employed as a nurse. She is currently employed on a casual basis as a food delivery driver.
10. The sponsor is a 42-year-old Australian citizen by grant. The sponsor migrated to Australia in 2008 from Burundi after being granted a humanitarian visa. He did not declare any previous marriages or de facto relationships in the application. The sponsor's mother and three sisters live in Australia. He is employed on a casual basis as an interpreter and a ride share driver.
11. The parties stated in the application that they met in 2006 in Tanzania while the sponsor was working as a teacher at the same school as the applicant's older sister. After the sponsor migrated to Australia in 2008, he maintained contact with the applicant's sister and then in 2010 started to communicate with the applicant. The sponsor visited the applicant in

Tanzania in November 2013 and the parties lived together until the sponsor returned to Australia in February 2014. Their eldest daughter was born in Tanzania in September 2014. The parties were married at Parramatta on 28 April 2017. They have subsequently had another two daughters, born in November 2019 and December 2021.

12. On 14 November 2023, the Department of Home Affairs granted the parties' eldest daughter, who is the secondary applicant, Australian citizenship by descent.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. Prior to the hearing, the applicants' representative provided additional information, including but not limited to the following: statutory declarations by the parties and mutual friends, copies of birth certificates for the parties' two younger daughters, a DNA test result confirming that the sponsor is the father of the parties' eldest daughter, and photographs of the parties with their children at various social occasions.
14. In making my findings, I have considered the documents in the Department and Tribunal files, the oral evidence at the hearing, and the additional documents that the applicants' representative provided following the hearing. I was mindful that it has been more than six years since the application was lodged with the Department and more than four years since the applicant lodged her review with the Tribunal. I had the benefit of receiving substantially more evidence than the delegate when she made her decision in October 2019, including the results of the DNA test for the parties' eldest daughter.
15. Prior to the delegate's decision, the Department received information that the sponsor had married another woman in Tanzania in 2005 and had five children during that relationship. The Department was informed that the sponsor was not divorced from his first wife. The Department also received information that the parties' relationship was contrived for visa purposes. The information was subject to a certificate under s 376 of the Act. I was satisfied that the s 376 certificate was valid.
16. I put the substance of the information to the applicant at the hearing in accordance with s 359AA of the Act. The applicants' representative requested two weeks to provide a response in writing, which the Tribunal granted.
17. On 18 January 2024, the applicants' representative submitted copies of the parties' daughters' passports and a statutory declaration by the sponsor, dated 17 January 2024. The sponsor denied that he was married prior to 2017, when he married the applicant. The sponsor claimed that the marriage certificate from Tanzania is fraudulent, and he noted that it is not signed by either the bride or groom. Furthermore, the sponsor said he was still attending high school in 2005.
18. The parties' oral evidence at the hearing was largely consistent, with a few exceptions that I did not consider material. Although the applicant was generally open and forthright in giving her oral evidence, her responses to questions about the contact that the sponsor has with his five children from his previous relationship were guarded. Those children live with their mother in Canberra. When asked about the discrepancy, the applicant said she misunderstood the question. I did not accept that the applicant misunderstood the question, and instead formed the view that she was reluctant to disclose any ongoing relationship that the sponsor is having with his children from a previous relationship. The applicant did not disclose that she and the sponsor had cared for the children for a brief period while the sponsor's previous partner travelled overseas in 2023 to get married.
19. I had regard to the response received after the hearing from the applicant's representative and was persuaded that the marriage certificate provided from Tanzania is not a genuine

document given it is not signed by either the bride or groom. I do not accept that the sponsor was still at high school in 2005 because he would have been 24 years old. Even so, I place no weight on that document, or the letter from a Pastor who allegedly performed the ceremony. I do not consider the allegations made that the parties' relationship is contrived is credible given they have three children together. Nevertheless, there is uncontested evidence that the sponsor fathered at least one child with his previous partner after the parties' eldest daughter was born and he claimed to be in a committed relationship with the applicant.

Whether the parties are in a spouse or de facto relationship

20. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
21. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

22. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The delegate did not query the validity of the parties' marriage. As discussed above, I was satisfied that the information received regarding the sponsor being previously married in Tanzania was not credible given the marriage certificate was not signed by either the bride or groom. I accepted the information in the sponsor's statutory declaration that he has not previously been married. Consequently, I was satisfied that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

23. *Financial aspects of the relationship*

24. The parties are both casually employed. The lease for their Department of Housing property is in the name of the sponsor's mother. The parties contribute to the rent and other outgoings. They do not own any joint assets or have any joint liabilities or legal obligations. Their wages are paid into their personal bank accounts. The parties have a joint account with the Commonwealth Bank, which they use for savings. The sponsor transfers money into the applicant's account for groceries and items for the children, which is evident from the bank statements provided. The amounts vary as his wages fluctuate from week to week. The sponsor has not claimed family tax benefit for the children, despite likely being eligible. He was unable to explain his reluctance to claim the payment. The sponsor pays child support of around \$500 per month to his former partner.

25. The parties gave a similar account of the arrangement of their finances, including their wages from employment. The applicant was aware that the sponsor pays child support to his former partner, but not the amount. Both parties are sending money to various relatives and community projects in Africa, and those transfers are shown in their bank statements. I accepted that the parties have been pooling their financial resources and sharing day-to-day household expenses since the applicant arrived in Australia in 2016.
26. I was satisfied that the financial aspects of the relationship are consistent with the applicant and her sponsor being in a genuine and continuing relationship.

27. *Nature of the household*

28. The parties gave entirely consistent oral evidence regarding the arrangement of their household. I accepted that they have been living together with the sponsor's mother since the applicant arrived in Australia. The sponsor's mother has significant health problems and receives a disability support pension. As a consequence, the parties provide her with day-to-day care. The applicant does the majority of the cooking and cleaning in the household. The parties share the laundry tasks. The sponsor mows the lawns and attends to outdoor maintenance.
29. The parties both contribute to the care of their three daughters. The applicant generally walks the eldest daughter to and from school, which is just a few hundred metres from their home, although the sponsor and his mother fulfil this role when the applicant is working. The parties' second daughter will attend preschool at the same school this year.
30. The evidence of the establishment of a joint household since 2016 and the shared responsibility for the care and support of the parties' three daughters provides significant weight in support of a finding of a genuine and continuing relationship.

31. *Social aspects of the relationship*

32. The parties gave consistent oral evidence that they enjoy taking their children to parks and playgrounds. The sponsor drives the family to various places he discovers in Sydney as an Uber driver. They visit friends in Woolgoolga for a few days each year. The applicant attends a nearby Anglican church, and the sponsor occasionally accompanies her.
33. Prior to the hearing, the applicant's representative provided photographs of the parties together with friends and relatives in various social settings.
34. The sponsor's mother gave oral evidence at the hearing that she has lived with the parties since the applicant came to Australia and she believes their relationship is genuine and continuing. The sponsor's mother said the parties do everything together, including caring for their three children. I considered the oral evidence from the sponsor's mother to be reliable.
35. The applicant's representative provided statutory declarations by two of the parties' friends prior to the hearing, which confirm that the parties hold themselves out to others as being in a married relationship. Ms Elizabeth Cocks said in her statutory declaration, dated 4 April 2023, that she met the parties at church and has known them since 2017. She said she visited them regularly at their previous home. Ms Cocks said the parties are loving and caring towards each other. Mr Antoine Musoni said in his statutory declaration, dated 5 April 2023, that he has known the applicant for six years and the sponsor for 25 years. He said the parties are happily married, live together with their three children and are involved in community events. I placed weight on those declarations as they contained considerable detail and both Ms Cocks and Mr Musoni have known the parties for some time.

36. I find that the applicant and her sponsor represent themselves to their families, friends and the community more broadly as being in a married relationship. The social aspects of the relationship support a finding that the parties are in a genuine and continuing relationship.

37. *Nature of the persons' commitment to each other*

38. The parties stated in the application that they met in 2006 and formed a committed relationship in 2013. Nonetheless, the sponsor gave oral evidence at the hearing that his previous partner gave birth to the youngest of his five children with her in 2017. His evidence indicates that the parties were not in an exclusive relationship until at least 2016. While that evidence was problematic and called into question the parties' other claims, in my view it is outweighed by the other evidence regarding the duration and nature of the parties' relationship.
39. I was satisfied on the basis of the evidence before me that the parties have been living together since November 2016 and have been in a committed relationship since that time. The parties gave consistent and persuasive evidence regarding the births of their three children, including that the sponsor was present at the hospital on each occasion. He was not in the delivery suite during the births due to cultural reasons. The results of a DNA test confirm that the sponsor is the father of the parties' eldest child. He is named as the father on all three birth certificates, and I had no reason to doubt the paternity of the younger children. The parties' three children attended the hearing. The youngest child slept in her pram throughout, but the older children related warmly to both the applicant and the sponsor and sought them out equally for comfort and reassurance.
40. The parties provided a generally consistent account of their plans for the future. They have not yet decided whether to have more children together. I accepted that they provide emotional support and companionship to one another. Their decision to have three children together is strong evidence that they are committed to the relationship and that they see it as long-term. Their mutual commitment to the welfare of their children was evident throughout the hearing.
41. I was satisfied that the applicant and her sponsor have a long-term commitment to each other. This provides significant weight in support of a finding of a genuine and continuing relationship.

42. *Conclusions*

43. After having regard to all of the circumstances of the relationship between the applicant and her sponsor, I was satisfied that they have a mutual commitment to a shared life together to the exclusion of all others. I was satisfied that the relationship between the applicant and her sponsor is genuine and continuing. I find that they live together and that therefore they do not live separately and apart on a permanent basis.
44. On the basis of the above, I was satisfied that the requirements of s 5F(2) are met at the time the visa application was made and at the time of this decision. There is no evidence to suggest that the sponsor is prohibited from being a sponsoring partner. Therefore, the applicant meets cl.820.211(2)(a) and continues to meet this criterion at the time of this decision.
45. The sponsor was over the age of 18 years at the time of application and continues to be the sponsoring partner. Accordingly, the applicant satisfies the criteria in cl.820.211(2)(c) at the time of application and continues to meet this criterion at the time of this decision. The applicant held a substantive visa when she lodged her application, so the criteria in cl.820.211(2)(d) is not relevant.

46. For the above reasons, I find that the applicant meets the criteria in cl.820.211(2). As the applicant continues to meet the requirements of cl.820.211(2) at the time of this decision, she meets the criteria in cl.820.221.
47. For completeness, I note that the sponsor's previous relationship was not declared to the Department. Given that issue was not considered by the delegate, I have not had regard to whether public interest criterion (PIC) 4020 is applicable, or if there are reasons to justify waiver.

48. *Secondary applicant*

49. The primary criteria must be satisfied by at least one applicant. Other members of the family unit who are applicants for the visa need satisfy only the secondary criteria, including, relevantly, cl.820.311.
50. The parties' eldest daughter was born in 2014 and is currently nine years old. The applicants' representative submitted documents prior to the hearing confirming that the Department of Home Affairs granted the secondary applicant Australian citizenship by descent on 14 November 2023. I concluded that the Tribunal had jurisdiction in relation to the secondary applicant, and that the appropriate action is to remit the application. I was satisfied on the evidence that the secondary applicant is a dependent child of the applicant and therefore meets cl.820.311(a)(i).
51. Given the findings above, the appropriate course is to remit the application for the visas to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

52. The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211(2) of Schedule 2 to the Regulations
 - cl 820.221 of Schedule 2 to the Regulations
- and with the direction that the second named applicant meets the following criteria for a Subclass 820 (Partner) visa:
- Schedule 2 to the Regulations
 - cl.820.311(a)(i) of
-

Glynis Bartley
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).